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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1265

BELL TELEPHONE LABORATORIES, INCORPORATED, AND DOUGLAS AIRCRAFT COMPANY, INC., *Appellants,*

v.

BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, ET AL., *Appellees.*

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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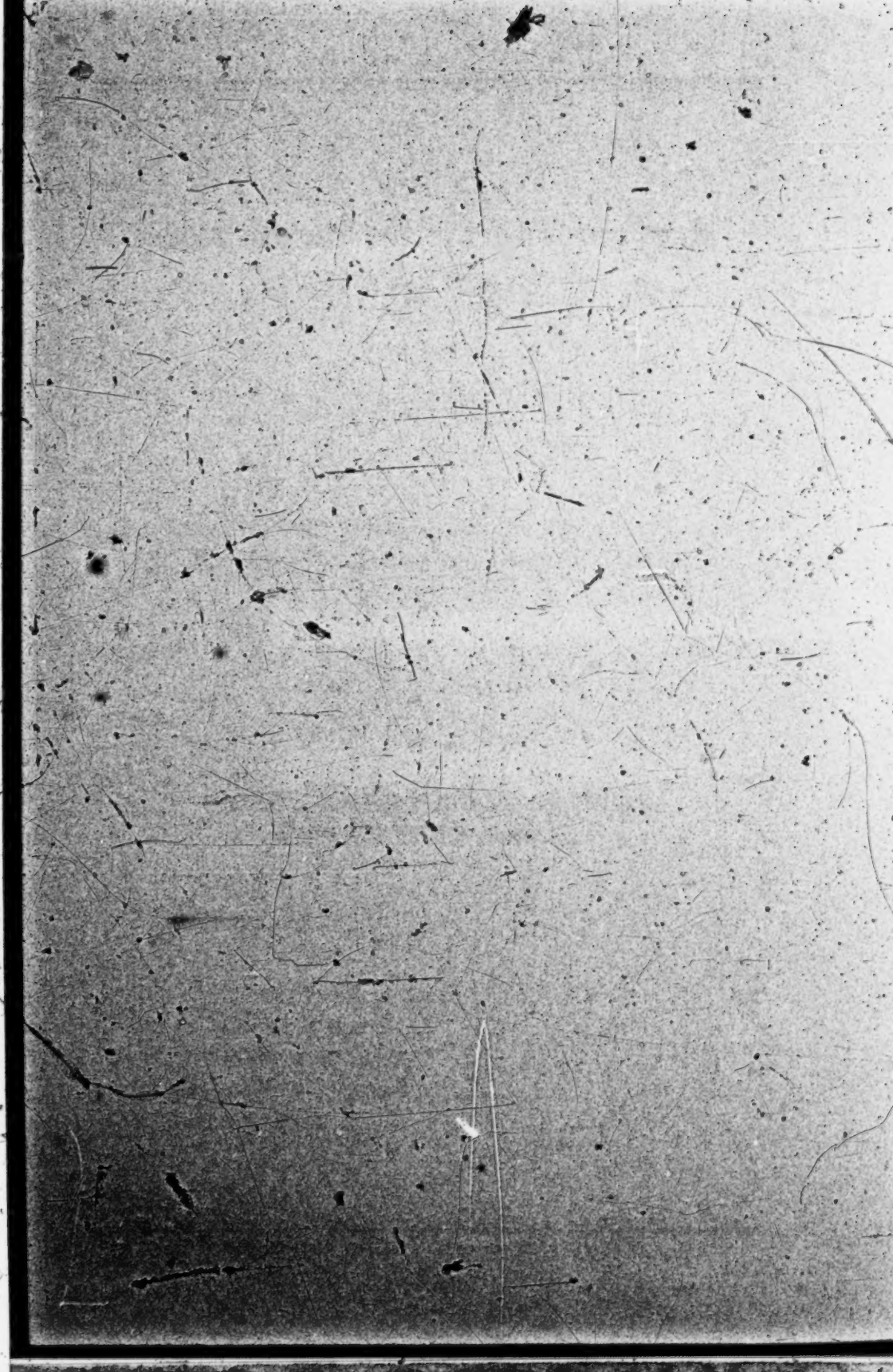

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MOTION

Comes now the Attorney General of New Mexico as attorney for Appellee pursuant to United States Supreme Court Rule 16(1)(b) and moves the Court to dismiss this appeal or in the alternative to affirm the decision of the New Mexico Supreme Court and states as his reason therefor that the appeal does not present a substantial federal question.

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BRIEF IN SUPPORT OF MOTION TO DISMISS

OPINION BELOW

The opinion of the New Mexico Supreme Court and the statutes involved are attached as exhibits to Appellants' Jurisdictional Statement.

STATEMENT OF THE CASE

The United States Department of Army contracted with Western Electric Company, Inc. for the design and development of a missile system. BTL, as an associate of Western Electric Company, Inc., performs Western's obligations as prime contractor. BTL's

work consists of design and development of the entire system.

Under purchase orders issued by BTL, DAC works on the design and manufacture of a part of the system. DAC's part pertains to test models of missiles and equipment for their handling and launching.

In the performance of their respective work, BTL and DAC conduct developmental tests of the system and its components. Large-scale tests involving the firing of missiles are conducted in isolated locations for reasons of safety. BTL and DAC have a choice in the location to be used. The choice depends upon the complexity of the test, the nature of the data required and the capabilities and limitations of the location. White Sands Missile Range in New Mexico is selected for tests requiring complete ground instrumentation and recovery of the missile for examination after firing.

BTL and DAC conducted tests in New Mexico on an intermittent basis from 1946 until the early 1950's and on a continuing basis thereafter. Employees of BTL and DAC are assigned to New Mexico for the purpose of conducting the tests.

BTL's New Mexico testing involves the following: the missile, its launch and handling equipment, the guidance system, radars, data collection equipment and other components of the system which are shipped to New Mexico. The components are assembled in New Mexico. The missile is launched. Performance of the system is recorded by telementry and other data collection procedures. The data are cursorily examined in New Mexico. Data relating to the performance of the guidance system and radars are then sent to BTL's New Jersey laboratory for reduction and analysis.

DAC's New Mexico testing involves the following: the several sections of the missile and all launching and handling equipment are shipped to New Mexico. The components are assembled in New Mexico, necessary adjustments are made and the missile is prepared for firing. Performance of the missile in flight is recorded by telementry and other data collection procedures. Such data are cursorily examined in New Mexico. Data relating to the missile and its launching and handling equipment are then sent to DAC's California plant for reduction and analysis.

Plaintiffs are not New Mexico corporations. Neither company maintains an office in New Mexico. The contract and the purchase order were negotiated and entered into outside New Mexico.

Most of the work done pursuant to the contract and purchase order is done outside of New Mexico. Much of the necessary testing is done outside New Mexico.

The Army furnishes BTL with temporary headquarters for use in connection with New Mexico tests and BTL furnishes DAC temporary headquarters for the same purpose. The only property of the plaintiffs that is involved is miscellaneous personal property used in connection with the tests. Their employees are in New Mexico only for the tests; however, their average stay is from two to four years.

Apart from their New Mexico testing activities, plaintiffs do not hold themselves out as engaged in business in New Mexico. They do not advertise, sell or distribute goods in New Mexico, nor attempt to obtain any other business in New Mexico.

DAC bills BTL for its work. Western bills the government for BTL's work. The total of bills submitted

by both plaintiffs includes costs and fees payable due to activities within New Mexico. The bills rendered do not segregate or attribute any part of the costs or fees to activities within New Mexico or any other state. However, the amount of New Mexico payrolls, some material costs and some items of indirect costs incurred in New Mexico are ascertainable from the records of the plaintiffs.

DAC's tax was computed on the amount of its payroll expense in New Mexico, its payroll tax on the New Mexico payroll plus 6 per cent of the total of these two items. The 6 per cent is estimated to be the fee earned thereon. BTL's tax was computed on the same basis except that nothing was included as fee. The parties stipulated that this computation was neither arbitrary nor unreasonable if there was a basis for making any allocation to New Mexico of amounts received under the contract and purchase order. They further stipulated that neither California nor New Jersey levy any sales or gross receipts tax on the proceeds of the contract or the purchase order.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED

Appellees agree with appellants that so far as it knows this is the first case to reach the United States Supreme Court concerning the research activities of contractors with the federal government. A great deal of money and time is spent each year in New Mexico testing missiles and related hardware on the White Sands Missile Range. A substantial portion of New Mexico, of course, has been isolated and is devoted to use as a missile range. The questions presented by the appellants are important to New Mexico and are important to the appellants. However, the questions

raised by appellants do not raise a substantial federal question. The factual situation presented by the appeal is limited to New Mexico by geography. As far as we know the only states which are used as missile testing grounds are New Mexico, Utah and perhaps Nevada. Illinois, Indiana, Louisiana, Mississippi, Washington and West Virginia are unsuitable for activities of this type.

Of the states mentioned on page 9 of Appellants' Jurisdictional Statement it is not clear whether any one of the states can or would, under its statute, attempt to tax types of activity such as that which is carried on in New Mexico, although Mississippi has successfully asserted its taxing authority over seismograph companies. *Monahan* v. *Seismograph Service Corporation,* 236 Miss. 278, 108 So.2d 721 (1959), *appeal dismissed* per curiam, 361 U.S. 35.

Section 72-16-4.1, New Mexico Statutes Annotated, 1953 Compilation provides:

> There is levied and shall be collected by the bureau of revenue privilege taxes measured by the amount or volume of business done, against the persons, *on account of their business activities, engaging or continuing within New Mexico,* in any business as defined in the following twelve sections of this 1959 act. The amount of the tax shall be determined by the application of the rates provided in the following sections against gross receipts. (emphasis supplied)

Section 117-14 of the Revised Laws of Hawaii contains substantially the same language as is contained in Section 72-16-4.1, New Mexico Statutes Annotated, 1953 Compilation, *supra,* although the regulations of

the Hawaii Revenue Department and the Hawaii cases do not indicate that Hawaii would, could, or has attempted to tax activities of the sort mentioned here. Mississippi has in the past taxed seismograph companies operating in Mississippi, *Monohan* v. *Seismograph Service Corporation, supra,* but no missile testing occurs in that state. Thus any decision of the United States Supreme Court could only affect New Mexico.

The question presented has been so explicitly foreclosed by *General Motors Corp.* v. *Washington,* 377 U.S. 346, (1964) and *Northwestern Portland Cement Company* v. *Minnesota,* 358 U.S. 450 (1959), as to leave no room for real controversy. Accordingly, the federal issue is not substantial and the appeal should be dismissed. *Zucht* v. *King,* 260 U.S. 174; *Palmer Oil Corp.* v. *Amerada,* 343 U.S. 390.

New Mexico has only attempted to tax the intrastate incidents of an interstate operation. These incidents are disjoined from interstate commerce and are fairly apportioned to the activities which the appellants conduct in New Mexico. The New Mexico Court found that the activities of Bell Laboratories and Douglas Aircraft in New Mexico could be separated from their activities in other states. (R. 95). It is by this time well established that a state may tax the intrastate incidents of an interstate transaction so long as those incidents are sufficiently disjoined from interstate commerce and the tax required to be paid is fairly apportioned. *General Motors Co.* v. *Washington, supra; Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250. The findings quoted above and the decision of the New Mexico Supreme Court were that the activities of the appellants could and had been properly disjoined

from their activities in other states. Their findings and conclusion should not be now overturned on appeal. *General Motors Corp. v. Washington, supra.*

Appellants contend that the New Mexico Supreme Court departed from the "intended" meaning of the General Motors decision. The General Motors decision makes it clear, and properly so, that a separate independent business is not required in order to allow a state to levy its tax upon the local receipts of the local portion of the business. We cannot believe that a straw problem should be created. General Motors is a clear statement of the law and it clearly dictates the result of this action. No substantial federal question exists.

The appellants next contend that a substantial question exists in that New Mexico does not have sufficient contact with the appellants to allow it to enforce its tax laws consistent with the requirements of the due process clause requirements of the United States Constitution.

The New Mexico Supreme Court stated the rule contained in *Wisconsin* v. *J. C. Penny,* 311 U.S. 435, for determining due process:

> Whether the taxing power exerted by the state bears some fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. . . .

The New Mexico Court then said:

> The link or connection, between New Mexico and the transactions it seeks to tax is that all the transactions occurred within New Mexico. What the

> state gave is the opportunity to engage in those transactions. The taxing power exerted bears a direct fiscal relation to the activities resulting from the opportunity afforded. Imposition of the tax does not violate the requirements of due process.

Appellants contend that the court erred in so concluding. The contacts which appellants have with New Mexico are far greater than those mentioned in *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, *Northwestern Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, and *Scripto, Inc.* v. *Carson,* 362 U.S. 207. Clearly, when the employees work here, when the missile is fired here, observed, photographed, and recovered here, they have substantial contact with New Mexico.

Appellants contend that only those persons who hold themselves out in some overt manner as engaged in business are subject to the tax. The cases on which appellants rely arise in the ordinary commercial context and overlook the distinctive qualities of government research and development contracts. There is only one customer for such services; the United States Government. The capital of the United States not being in New Mexico, one scarcely wonders that the solicitation for missile testing activity does not occur within New Mexico. The holding out, if any, must necessarily occur where the customer can observe, appreciate, and hire the seller. So it is with many contracts and many services. The contract is signed outside New Mexico; employees are sent here only temporarily; there is no advertising in New Mexico, for all we know in New Mexico the out-of-state contractor does not exist. Yet when he comes into this state to perform, or partially perform, the contract, his activity

here is taxable. The point is that the "holding out" does not have to occur within New Mexico; it is only necessary that the performance called for in the contract occur within this state.

We are dealing here with a substantial privilege within the State of New Mexico. Vast areas of the state are given over to White Sands Missile Range. No taxes are assessed against these lands, no citizen of the state, as such, is permitted on them. Employees of these appellants, in great numbers move to New Mexico and live here for years. Their children attend our schools, they receive our protection and the protection of our laws. (Allen Dep. 6, 7, 8, Tr. 92-95).

It goes without saying that corporations which have been engaged in firing missiles into the New Mexico sky for almost twenty years as a part of contracts which call for the testing of missiles, using sometimes as many as two hundred employees are engaged in business in New Mexico. They have substantial contacts with New Mexico. The due process requirements have been satisfied. See *General Motors Corp.* v. *Washington, supra; Northwestern States Portland Cement Co.* v. *Minnesota, supra.*

Appellants next contend that Section 72-16-29 and 72-13-67, New Mexico Statutes Annotated, which authorize the use of injunctions against certain taxpayers invalidate the Emergency School Tax Act as applied to appellants. The question of enjoining the taxpayer from doing business in New Mexico was not before the New Mexico Court since the appellees had not sought to enjoin the taxpayers. The New Mexico Supreme Court does not give advisory opinions, *Wanser* v. *Fugua,* 46 N.M. 217, 126 P.2d 20 (1942). The United

States Supreme Court does not give advisory opinions either, *Bell v. Maryland*, 378 U.S. 237 (1964). Therefore the United States Supreme Court should not even consider appellants' third contention.

CONCLUSION

For the reasons stated above the appellees believe that no substantial federal question exists and that any decision of the Court would only be of interest to appellants and the State of New Mexico. The appeal should be dismissed.

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APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

No. 1265. Decided June 12, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.